LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
OCT 31 1968
JOHN F. DAVIS, CLERK

No. 74

# In the Supreme Court of the United States

OCTOBER TERM, 1968

PHILIP JEROME STILES, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT*

## BRIEF FOR THE UNITED STATES

ERWIN N. GRISWOLD,
*Solicitor General,*
FRED M. VINSON, Jr.,
*Assistant Attorney General,*
PHILIP A. LACOVARA,
JOSEPH J. CONNOLLY,
*Assistants to the Solicitor General,*
JEROME M. FEIT,
LAWRENCE P. COHEN,
*Attorneys,*
*Department of Justice,*
*Washington, D.C. 20530.*

# INDEX


| | Page |
|---|---|
| Opinion below | 1 |
| Jurisdiction | 1 |
| Questions presented | 1 |
| Statute involved | 2 |
| Statement | 2 |
| Summary of argument | 6 |
| Argument: | |
| I. The evidence supports petitioner's conviction of knowingly and wilfully failing to comply with an induction order issued by his local Selective Service Board | 10 |
| II. The district court did not err in failing to dismiss the indictment or in refusing to grant a continuance of the trial to permit petitioner to take an Armed Forces physical examination to determine if he was then physically suitable for military service | 15 |
| A. The United States Attorney did not request dismissal of the indictment | 19 |
| B. The trial judge did not abuse his discretion in refusing to grant a continuance so that petitioner could undergo a physical examination | 21 |
| C. The question of petitioner's suitability for military service was not a material issue at trial | 22 |
| III. The trial court properly terminated a line of inquiry dealing with the authority of the clerk of the local board to sign induction notices | 29 |




323-950—68——1

Argument—Continued
IV. The evidence did not establish insanity as a matter of law ..... Page 32
Conclusion ..... 37

CITATIONS

Cases:

*Bartchy* v. *United States*, 319 U.S. 484 ..... 11
*Billings* v. *Truesdell*, 321 U.S. 542 ..... 14, 26
*Birdsell* v. *United States*, 346 F. 2d 775, certiorari denied, 382 U.S. 963 ..... 36
*Estep* v. *United States*, 327 U.S. 114 ..... 27, 32
*Falbo* v. *United States*, 320 U.S. 549 ..... 20
*Graves* v. *United States*, 252 F. 2d 878 ..... 14
*Kent* v. *United States*, 207 F. 2d 234 ..... 31
*King* v. *United States*, 372 F. 2d 383 ..... 36
*Merrill* v. *United States*, 338 F. 2d 763 ..... 37
*Moorman* v. *United States*, 389 F. 2d 27 ..... 11, 15, 27
*Powell* v. *Texas*, 392 U.S. 514 ..... 37
*Smith* v. *United States*, 157 F. 2d 176, certiorari denied, 329 U.S. 776 ..... 31
*Standard Oil Co.* v. *Johnson*, 316 U.S. 481 ..... 25
*Talcott* v. *Reed*, 217 F. 2d 360 ..... 31
*United States* v. *Collura*, 139 F. 2d 345 ..... 29
*United States* v. *Fratrick*, 140 F. 2d 5 ..... 31
*United States* v. *Freeman*, 357 F. 2d 606 ..... 33
*United States* v. *Hoffman*, 137 F. 2d 416 ..... 14
*United States* v. *Irons*, 369 F. 2d 557 ..... 29
*United States* v. *Lawson*, 337 F. 2d 800, certiorari denied, 380 U.S. 919 ..... 31
*United States* v. *Norris*, 341 F. 2d 527, certiorari denied, 382 U.S. 850 ..... 32
*United States* v. *O'Brien*, 391 U.S. 367 ..... 28
*United States* v. *Shapiro*, 383 F. 2d 680 ..... 33
*United States* v. *Tucker*, 374 F. 2d 731 ..... 32
*Washington* v. *United States*, 390 F. 2d 444 ..... 36
*Williams* v. *United States*, 203 F. 2d 85, certiorari denied, 345 U.S. 1003 ..... 14, 25, 27

Statutes:

| | Page |
|---|---|
| 50 U.S.C. App. 454(a) | 23, 26 |
| 50 U.S.C. App. 462 | 2, 10 |
| 50 U.S.C. App. 462(a) | 1, 22, 29 |

Miscellaneous:

| | |
|---|---|
| American Law Institute, *Model Penal Code* (Proposed Official Draft (1962)) | 33 |
| Army Regulations: | |
| AR 601–270, para. 13 (1965) | 25 |
| AR 601–270, para. 13(g) | 26 |
| AR 601–270, para. 40(e)(2) | 26 |
| AR 601–270, para. 40(e)(3) | 27 |
| AR 601–270, para. 68(1) | 26 |
| Code of Federal Regulations: | |
| 32 C.F.R. 1604.59 | 31 |
| 32 C.F.R. 1628.10 | 24 |
| 32 C.F.R. 1631.7(a) | 12, 23, 20 |
| 32 C.F.R. 1631.7(a)(1) | 30 |
| 32 C.F.R. 1632.14(b) | 24 |
| 32 C.F.R. 1632.20(a)(3), (b)(3) | 25 |
| 32 C.F.R. 1632.30 | 25 |
| 32 C.F.R. 1641.3 | 10 |
| Federal Rules of Criminal Procedure: | |
| Rule 47(a) | 21 |
| SSLR Practice Manual: | |
| 1104 | 20 |
| 1127 | 27 |

# In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 74

PHILIP JEROME STILES, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT*

## BRIEF FOR THE UNITED STATES

### OPINION BELOW

The court of appeals affirmed without opinion.

### JURISDICTION

The judgment of the court of appeals was entered on September 20, 1967 (A. 154). The petition for a writ of certiorari was filed on October 9, 1967, and was granted on May 6, 1968 (A. 155; 391 U.S. 903). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

### QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support the jury's verdict that petitioner wilfully and knowingly failed to comply with an induction order issued by his local Selective Service Board.

2. Whether, in the circumstances of this case, the district court abused its discretion in refusing to postpone the trial so that petitioner's suitability for service in the Armed Forces could be determined by a physical examination.

3. Whether the trial court properly terminated a line of inquiry dealing with the authority of the clerk of the local Selective Service Board to sign induction notices before they are mailed.

4. Whether the evidence required the jury to return a verdict of not guilty by reason of insanity.

## STATUTE INVOLVED

50 U.S.C. App. 462 provides in pertinent part:

(a) * * * any person * * * who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title * * *, or rules, regulations, or directions made pursuant to this title * * *, shall, upon conviction * * *, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both * * *.

## STATEMENT

After a jury trial in the United States District Court for the District of Rhode Island, petitioner was convicted of knowingly failing to comply with an order "to submit to induction" issued by his local Selective Service Board, a violation of 50 U.S.C. App. 462. On March 17, 1967, he was sentenced to imprisonment for two years (A. 148, 149–150). The court of appeals affirmed without opinion (A. 154).

1. The underlying evidence is not in dispute. In October 1964 petitioner was given a 2–S classification (a student deferment) by his local draft board (A. 27–28). On November 9, 1965, having left college, he was reclassified I–A, and a notice of his classification was mailed to him on November 17, 1965 (A. 28). On November 29, 1965, he was ordered to report for a pre-induction physical examination but failed to do so. On December 21, 1965, he was ordered to report for a physical examination on January 6, 1966 (A. 28–29). Although there is no doubt that he actually received these notices, petitioner failed to report on either occasion. On January 11, 1966, petitioner was sent a notice by registered mail advising him that he had been declared delinquent because of his failure to appear for a physical examination on January 6 (A. 29, 63–65; G. Ex. 9). He accepted and signed for that notice on January 13 (G. Ex. 9). On January 14, 1966, he was ordered for a third time to report for a pre-induction physical, this one scheduled for January 20, 1966 (A. 30). Three days later (January 17), petitioner mailed a letter to his local board protesting the "threatening letters" which continued to arrive from the board "telling me exactly what to do and informing me of the penalties for not complying with your directives." He pointed out that he could "only repeat my previous assertion that I am unwilling to be a part of the organized murder and threat of murder which is the basis of any army."[1] This letter further

[1] In November 1963, petitioner had sent the local board a signed letter entitled "Selective Service Disaffiliation", pur-

advised the board that if it wished to discuss "these matters further perhaps we could arrange a mutually convenient time and place" (A. 48; G. Ex. 6). Petitioner added a postscript (A. 48):

> P.S. I am going to take a vacation trip of a month or two. I tell you this because my leaving town with no definite forwarding address might otherwise seem evasive. Don't worry, I'll send you post cards letting you know how I'm getting along.

Petitioner failed to appear on January 20 for the third scheduled physical examination, and a second delinquency notice was mailed to him (A. 30).

On January 24, 1966, the clerk of the local board sent to petitioner, by registered mail with return receipt requested, a notice to report for induction on February 9, 1966 (A. 30–32, 36–39; G. Ex. 2). The notice was addressed to petitioner at 10 Fortin Road, Kingston, Rhode Island, his last known address and the one he had designated in his most recent current information questionnaire (A. 26, 31–32, 38; G. Exs. 1, 2). The next day, petitioner's mother signed for and accepted delivery of the order (A. 113). Petitioner thereafter failed to report for induction as directed (A. 30–31, 40).

---

porting to disaffiliate himself "from all the functions and process of the Selective Service Act" on the ground of his unwillingness "to participate in a system of violence, war and preparation for war." Attached to the document was his "Notice of Classification" card (A. 44; G. Ex. 5).

At no time, however, did petitioner seek an exemption from military service as a conscientious objector.

On February 11, 1966, two days after this failure to report, petitioner mailed a postcard to his local board from Knoxville, Tennessee, stating, "I'm still thinking about you, and will let you know as soon as I have an address" (A. 49–50; G. Ex. 7). On February 15, 1966, petitioner sent his local board a postcard giving a Mexican address "for the time being." On the postcard, he further suggested that it "would be nice if you could send me a new draft card, as having one would facilitate my return to the USA" (A. 51–52; G. Ex. 8). Petitioner did not again contact his local board.

During an interview with an F.B.I. agent on April 13, 1966, petitioner stated that he had received his induction notice only after returning from Mexico in the middle of March 1966, about a month after the te (February 9, 1966) on which he had been directed to report for induction; and that while he would be willing to report for a physical examination, he would not report for induction (A. 69–74, 76).

As a defense witness, petitioner's mother testified that petitioner had left home for a vacation some time after mid-January, saying that he was going to visit some friends in New York City, but giving no precise address. She admitted that she had signed for and accepted the envelope which contained the induction notice, but declared that the envelope was not opened until petitioner's return in the early part of March 1966 (A. 112–115).

2. The main defense at trial was that petitioner was not mentally responsible at the time of his failure to

report for induction on or about February 9, 1966. We set forth and discuss the medical testimony on this defense under Point IV, *infra,* pp. 32–37. Suffice it to say at this juncture that the jury found petitioner guilty as charged (A. 140).

## SUMMARY OF ARGUMENT

I

The statute under which petitioner was convicted and the pertinent regulation do not require proof that petitioner actually received the order to report for induction. A conviction of knowingly failing to comply with a duty under the Act may be supported by evidence which shows that the defendant was aware of his duty and intentionally failed to satisfy it. The evidence here showed that petitioner twice failed to report for physical examinations. Because of these failures he was declared a delinquent—a classification which, under well-publicized regulations, has the highest priority call of all selectees—and was notified that his previous defaults constituted criminal offenses. Petitioner then wrote a letter to his local board evincing a full awareness of the consequences of his delinquency and advising the board that he was leaving for several months "with no definite forwarding address." After failing to report for a third scheduled physical examination, petitioner left for a two-month trip without advising his mother or the draft board where he could be reached. In the circumstances of petitioner's departure on the eve of his order to

report for induction, the jury reasonably found a knowing and willful failure to comply with the order, which in fact was received at his home just a few days after his claimed departure.

II

In a colloquy initiated by defense counsel at the outset of trial, the court was informed that defense counsel and the United States Attorney had agreed that the prosecution would be discontinued if petitioner would submit to induction. Nothing in the Assistant United States Attorney's representations during that colloquy can be viewed as a present motion to dismiss the indictment. Such a motion would have been unauthorized in the absence of prior approval of the Department of Justice. And there was no suggestion that petitioner had retreated from his stated position that he would not serve in the Armed Forces; he had in no way indicated that at the time of trial he was willing to be inducted into the Army if found qualified.

Even if the colloquy may be viewed as presenting an unarticulated motion for a continuance to determine petitioner's suitability for military service, the trial court did not abuse its discretion in refusing to delay the trial for that purpose. The question of petitioner's mental or physical fitness for military service involved neither an element of the crime charged nor a defense to it. Under applicable regula-

tions, the local board was required to order petitioner to report for induction without a prior finding of fitness—a finding which petitioner made impossible in this case by refusing to report for pre-induction physicals. A delinquent registrant's suitability for military service is to be determined at the time he reports for induction and submits to the induction process. The duty to report for induction cannot be ignored on the ground that the individual thought that he would be found disqualified or was willing to leave that determination to a subsequent criminal trial. The court therefore properly exercised its discretion in refusing to grant a continuance and did not err in limiting cross-examination on the immaterial issue whether petitioner might have been found to be unsuitable for induction.

III

The trial court correctly pretermitted the cross-examination of the clerk of petitioner's local board on the issue whether she was authorized to sign notices to report for induction. Petitioner does not contend that he was improperly selected to report for induction; under the regulations the local board was required to order petitioner for induction before men in any other classification, even volunteers, could be called. The clerk who signed petitioner's notice testified that she had served as clerk of the board for 17 years and had customarily signed such notices. Any irregularity in the clerk's authority to sign the form on behalf of the local board was, at most, a

minor defect in the way in which an admittedly valid duty to report was communicated to petitioner. In the absence of any claim that petitioner was at all prejudiced by such a defect, the challenge to the scope of her actual authority presented no defense to the charge of failing to comply with the duty to report. Furthermore, even if the clerk's authority were material in this case, it presented a question of law for the court. The trial judge properly declined to allow petitioner's counsel to continue that line of questioning before the jury.

IV

All doctors agreed that petitioner was fully cognizant of his duties and understood the consequences of his failure to comply with them. The testimony with respect to petitioner's sanity at the time he failed to report for induction showed, at most, a difference of medical opinion as to whether petitioner was emotionally able to comply with his Selective Service obligations. The evidence hardly compelled a reasonable doubt as to petitioner's sanity as a matter of law. In these circumstances, the conflict of medical opinion as to the impact of petitioner's emotional problem was properly submitted to the jury under admittedly correct instructions. The jury's finding that petitioner was criminally responsible for his conduct is supported by substantial evidence and should not be disturbed.

## ARGUMENT

### I. THE EVIDENCE SUPPORTS PETITIONER'S CONVICTION OF KNOWINGLY AND WILFULLY FAILING TO COMPLY WITH AN INDUCTION ORDER ISSUED BY HIS LOCAL SELECTIVE SERVICE BOARD

The primary basis of petitioner's contention that the evidence was insufficient to support his conviction is that there was no showing that he actually received the order to report for induction in time for him to comply with it. He refers to testimony which indicates that he was away from his home at the time the induction order was issued and that his mother, who received the order, retained the unopened envelope and did not deliver it to him until he returned from Mexico, about one month after the date on which he was required to report. But even if that testimony is accepted as fact, the absence of evidence that petitioner seasonably received the order did not entitle him to a directed verdict of acquittal.

Petitioner's argument is premised on a misunderstanding of the mental state comprehended by 50 U.S.C. App. 462. Proof of actual receipt of an order is not essential to a finding that the individual "knowingly" failed to comply with the duty which it prescribed. The pertinent regulation (32 C.F.R. 1641.3), which was read to the jury (A. 33), provides:

> It shall be the duty of each registrant to keep his local board advised at all times of the address where mail will reach him. *The mailing of any order, notice, or blank form by the local board to a registrant at the address last reported by him to the local board shall consti-*

> *tute notice to him of the contents of the communication, whether he actually receives it or not.* [Emphasis added.]

This regulation is fully consistent with the statute's command that only a "knowing" disregard of a duty under the Act may be punished. The proper functioning of the Selective Service System, like the collection of taxes and other forms of comprehensive governmental regulation, depends critically on good-faith compliance by each individual. Congress plainly did not contemplate that an individual could disregard the orders of his local board, and escape prosecution, by refusing to accept a letter from the board, or failing to apprise himself of its contents, or placing himself beyond the reach of the process by which the board ordinarily communicates its notices and orders. See *Moorman* v. *United States,* 389 F. 2d 27 (C.A. 5). On the other hand, we do not read the statute and the regulation as authorizing the conviction of an individual who makes himself reasonably amenable to the process of the Selective Service System and whose failure to comply with an order results from the order's being lost or misdirected in the mails, or from some other circumstances not evincing an intentional avoidance on his part. See *Bartchy* v. *United States,* 319 U.S. 484. Failure to receive the order in such a case ordinarily would negate any finding that the individual had the degree of culpability required by the statute, *i.e.,* that he "knew" he was failing to comply with the order. But actual notice of the "contents of the communication" is not required to establish a

knowing failure to comply where the individual was aware of the duty and nevertheless took no action to satisfy it.

The evidence presented at trial was sufficient to support the jury's finding that petitioner knowingly failed to comply with the induction order. Indeed, it showed a course of conduct, culminating in petitioner's failure to report for induction, which evinced a wholesale disregard of his Selective Service obligations and an awareness of the consequences which would follow from his recalcitrance.

In December 1965 and again on January 6, 1966, petitioner failed to report for physical examination in accordance with orders that had been sent to him (A. 28–29). On January 11, 1966, petitioner was declared delinquent by his local board because of his failure to report for the January 6 physical examination. A delinquency notice (SS Form 304) was mailed to his home at 10 Fortin Road and was received by him (G. Ex. 9, A. 63–65). On January 14, a third notice of physical examination was mailed to petitioner, ordering him to report for examination on January 20 (A. 30).

After receiving the delinquency notice, petitioner could hardly have been unaware that his induction was imminent. Selective Service regulations specifically provide that delinquents must be called first, even before volunteers for induction, in satisfying the quota of inductees assigned to each local board (32 C.F.R. 1631.7(a)). Petitioner's awareness of his situation is evidenced by the letter which he wrote to the

local board on January 17, four days after he received the delinquency notice (G. Ex. 6, A. 47–49):

> Your threatening letters continually arrive, telling me exactly what to do and informing me of the penalties for not complying with your directives.
>
> In response, I can only repeat my previous assertions that I am unwilling to be a part of the organized murder and threat of murder which is the basis of any army.
>
> There are better forms of communication than impersonal printed forms filled with orders and threats. * * *
>
> * * * * *
>
> P.S. I am soon going to take a vacation trip of a month or two. I tell you this because my leaving town with no definite forwarding address might otherwise seem evasive. * * *

On January 20, petitioner failed for the third time to report for a scheduled physical examination (A. 30). He subsequently told an F.B.I. agent that he "didn't want to report for the physical examination and yet was aware of threats of what would happen [to him] if he did not" (A. 74). Four days later the local board mailed the order to report for induction (G. Ex. 2, A. 37–38). Petitioner's mother testified that she received the letter on the following day, but that he had already left for New York to visit some friends (A. 112–114).

On the basis of this evidence, the jury could reasonably find that petitioner's failure to report for induction was the final step of a deliberate course of noncompliance with the Selective Service law, in full accord with the views he had expressed as early as

1963, when he returned his classification card to his local board with a document purporting to renounce any obligations he had under the Act (G. Ex. 5, A. 44).[2] This is not a case in which an individual failed to comply with an order which was not anticipated or which failed to reach him through channels reasonably expected to be reliable. Petitioner could not have viewed his induction order as anything but inevitable; indeed, there was testimony from which the jury may have inferred that petitioner in fact was apprised of the receipt of the order at his home. He revealed to his psychiatrist that he knew intellectually "that he was failing to comply to the law but emotionally was unable to get himself to do anything about it" (A. 98; see also A. 95).

Nothing in petitioner's personality disorder (discussed more fully in Point IV, *infra*) suggests that he lacked the intellectual capacity to realize the imminence of the induction order or to form the requisite intent for "knowingly" failing to comply with his obligations. Petitioner is a young man of intelligence who knew intellectually that he was failing to comply with the law (A. 87–88, 98). His defense was that he was emotionally unable to respond properly to situations that he perceived. The level of culpability required under this statute is simply the "usual criminal intent" formed on the basis of an awareness of the facts that make an omission unlawful. See *Graves* v. *United States,* 252 F. 2d 878, 881–882 (C.A. 9); *United States* v. *Hoffman,* 137 F. 2d 416, 419 (C.A.

[2] Compare *Williams* v. *United States*, 203 F. 2d 85, 87 (C.A. 9), certiorari denied, 345 U.S. 1003; see also, *Billings* v. *Truesdell*, 321 U.S. 542, 557.

2); compare *Moorman* v. *United States, supra,* 389 F. 2d at 30. It was thus well within the jury's province to find subjective knowledge on petitioner's part of the obligations he refused to honor. Petitioner himself recognized that his leaving home with no forwarding address might "seem evasive", as indeed it was. He did not tell his mother or the local board where he could be reached in New York. And his first communication with the board—a postcard mailed from Knoxville, Tennessee, one month after he had been declared delinquent and two days after the induction date—stated only: "I'm still thinking about you, and will let you know as soon as I have an address" (G. Ex. 7, A. 50). The jury may have inferred that this was a self-serving statement attempting to conceal actual knowledge of his recent default. But even if the jury believed that petitioner was not informed of the receipt of the registered letter from his draft board, it reasonably could have found that petitioner's departure on the eve of his induction order was a deliberate attempt to avoid actual receipt of the order which he realized was imminent. No more was required for conviction.

II

THE DISTRICT COURT DID NOT ERR IN FAILING TO DISMISS THE INDICTMENT OR IN REFUSING TO GRANT A CONTINUANCE OF THE TRIAL TO PERMIT PETITIONER TO TAKE AN ARMED FORCES PHYSICAL EXAMINATION TO DETERMINE IF HE WAS THEN PHYSICALLY SUITABLE FOR MILITARY SERVICE

Prior to trial, petitioner's counsel filed a motion requesting the trial court to order the Armed Forces Examining and Entrance Station to examine petitioner to determine his suitability at that time for military service (A. 7–8). That motion was denied on

December 1, 1966 (A. 9). Five days before trial, petitioner interposed a defense of insanity (A. 10). On the opening day of trial, the following colloquy took place (A. 20–23):

> Mr. ROGERS [counsel for petitioner]. After being advised to report here for trial at 2 o'clock here this afternoon, myself and John Notte, Esq. [co-counsel for petitioner] had a conference with the United States District Attorney for this District, Mr. Frederick Faerber, Esq., who advised me—and I represent to this Court—in the event that my client, who stands indicted for failure to report for induction were in fact to submit to induction into the military forces of this country, and were found by the Selective Service Authority to in fact be unacceptable, that the United States Attorney's office would in fact move in open court to dismiss the indictment against the defendant.
>
> I make those representations to this Court as my best recollection of the conference with Mr. Faerber, and I ask Mr. Notte to state for the record whether or not this is a fair and accurate representation of the conversation we had.
>
> Mr. NOTTE. This is a fair and accurate representation, your Honor.
>
> Mr. GEARON [Assistant United States Attorney]. Your Honor, the position of the United States Attorney is essentially what Mr. Rogers said. However, it is felt, for the purposes of this record, that the reason for so doing is that the Selective Service takes the position that if a person would report for induction, it is better to have them so report than to be incarcerated in jail in the event of a conviction upon this type of case.

However, because of this case and the situations and the examinations made by psychiatrists, I feel it should be placed in the record one of the considerations for the Government taking this position is that although the man is charged with failure to report for induction—which does not mean necessarily he will become a member of the Armed Forces—it is directing him, as a citizen of the United States within military age, to submit to an induction and physical examination to determine his eligibility for the Armed Forces. That is what this indictment charges him with: failure to report for induction.

The COURT. I thought it charged him with failure to report for examination.

Mr. GEARON. No, failure to report for induction, submit to the induction in the Armed Forces. But because of the uniqueness of this situation and in view of the fact that there has been psychiatric examination of this defendant, and a psychiatric examination by three doctors at the Naval Base in Newport on Friday, January 13, 1967, wherein the conclusion at the end of the examination, signed by the three physicians, psychiatrists—their comment is as follows:

> "From the above history and findings it is the opinion of this board of psychiatric examiners that this person was at the time of any alleged offenses so free from mental defect, disease or derangement as to be able concerning any particular acts charged to adhere to the right. He possesses sufficient mental capacity to understand the nature of any proceedings against him and intelligently to conduct or cooperate in his own defense. It is also the opinion of this

board that this person is unfit for military service."

And it is signed by E. A. Vadeika, Frank M. Moscarillo, and A. H. Schwartz.

I have a further examination conducted by Max Faintych.

The COURT. Would you gentlemen be good enough to make clear to me what this is all about?

Mr. GEARON. This is the position: that if this man submits to induction, in all probability he will not be acceptable anyway. But in view of the fact that he is willing to go down for induction, the Government would take the position—and the United States Attorney has recommended—that there would be no further prosecution because it would really in effect—if he were a person who could be eligible for the Armed Forces, there would be a point in going forward with it. But insofar as this person, while charged with failure to report for induction, which is a serious crime,—

The COURT. Are you ready to go to trial or aren't you?

Mr. GEARON. We would continue it if this man—

The COURT. I see no need of it. Let's try this case and get it behind us. That is my position. Either he is guilty or he isn't.

(Bench conference concluded.)

(Jury impaneled.)

In our memorandum opposing certiorari in this case, we brought the foregoing colloquy to this Court's attention. We stated our view that because of the peculiar circumstances of this case the Assistant United States Attorney acted with wisdom in evinc-

ing a willingness to explore alternatives to prosecution, but we concluded that the trial judge had not abused his discretion in directing that the trial proceed (see Memorandum in Opposition, No. 772 Misc., O.T. 1967, pp. 6–7).

The gist of petitioner's argument appears to be that the trial judge abused his discretion in two ways. First, he suggests, the court should have treated the statement by the Assistant United States Attorney as a motion to dismiss and considered it as such (see Br. 5, "Questions Presented," No. 5). Secondly, he argues that the trial court erroneously determined that a draft registrant could be found guilty of the crime charged in the indictment without ever having had a physical examination to determine his actual physical suitability for military service and incorrectly ruled that suitability was not in issue (Br. 6, "Questions Presented," No. 7).

A. THE UNITED STATES ATTORNEY DID NOT REQUEST DISMISSAL OF THE INDICTMENT

It is clear, we submit, that the remarks of the Assistant United States Attorney in the course of the opening colloquy (*supra,* pp. 16–18) do not amount to a motion to dismiss the indictment. The colloquy was initiated by defense counsel, and its context plainly reveals that it was designed simply to apprise the court of the results of a discussion between the parties as to possible alternatives to pressing the prosecution. For reasons which we shall elaborate *infra,* the alternative discussed, while solicitous, was

misdirected and unauthorized.[3] But since, as explained to the court, the possibility of discontinuing the prosecution turned on two contingencies which had not as yet occurred—petitioner's submission to the induction process and his rejection as unfit for military service (A. 22)—the Assistant's representations can-

[3] A United States Attorney may not move for leave to dismiss a criminal case after indictment unless authorized to do so by the Department of Justice. No request was made in the present case, and accordingly no authorization was given. Moreover, had authorization been requested, it would have been denied in the circumstances.

Undeniably, the ultimate objective of the Selective Service process is not to secure convictions, but to man the Armed Forces of the United States. See *Falbo* v. *United States*, 320 U.S. 549, 551–552. For this reason, the Department of Justice authorizes dismissal of prosecutions against Selective Service violators who are willing to correct their delinquency and submit to all of the induction processes up to the point of acceptance or rejection by the Armed Forces, and who are willing to enter the Army if found qualified. See SSLR Practice Manual ¶ 1104, at 1075. The policy does not extend, however, to those persons (like petitioner) who may be willing to submit to physical examinations, but not to military service; nor does it extend to persons (also like petitioner) who attempt to compromise their guilt by making an offer to submit to physical examinations only after learning that they would be "in all probability" (A. 22) unacceptable for military service.

There is no indication that petitioner ever retreated from his position—made known to an F.B.I. agent (see A. 70)—that he would report for a physical examination but would not actually enter the Army if found qualified. Petitioner's offer through counsel to submit to "induction" (A. 21) did not come until he had learned that three Navy psychiatrists considered him unfit for military service (A. 22). His offer must, therefore, be understood in context as limited to submission to a physical examination only, and in these circumstances, dismissal of the prosecution would not have been authorized by the Department of Justice.

not fairly be construed as a present motion to dismiss, and the court was fully warranted in not so construing them.

Moreover, even when the government wishes to *nol pros* a case, an indictment may be dismissed only "by leave of court". Fed. R. Crim. P. 48 (a). Thus, insofar as we assume *arguendo* that the prosecutor—though without the authority to do so—was seeking dismissal of the indictment, the trial court was acting within its sound discretion in refusing, once the court's processes had been invoked, to permit discontinuance. As the court rather succinctly observed, and the Assistant United States Attorney did not dispute—"Either he is guilty or he isn't" (A. 23). That is, as we show *infra*, pp. 22–29, petitioner's criminal responsibility for refusing to report for induction depended on past events that did not turn upon his acceptability at the time he failed to report or at the time of trial.

B. THE TRIAL JUDGE DID NOT ABUSE HIS DISCRETION IN REFUSING TO GRANT A CONTINUANCE SO THAT PETITIONER COULD UNDERGO A PHYSICAL EXAMINATION

In our view, the most that can be said of the colloquy that took place at the opening of trial is that it constituted a motion for a continuance. Such a motion is, of course, addressed to the sound discretion of the court, and denial of the request is not reversible error unless discretion has been plainly abused to the prejudice of the defendant. Here, there was neither abuse nor prejudice. Delay was first suggested to the court after the case had been called for trial. There

was no suggestion that either side was not ready for trial on the merits. In light of what we have said with respect to the court's discretion to deny a request by the government that the case be dismissed (*supra*, p. 21), it follows *a fortiori* that it was within the scope of the court's responsible judgment to refuse to concur in a delay designed solely to ascertain a state of facts that the court would not have accepted as a basis for dismissing the indictment. Nor can petitioner point to any prejudice. Petitioner's mental and physical suitability for acceptance into the Armed Forces involved neither an element of the offense with which he was charged nor a defense to it. He therefore has no basis for protesting the trial court's refusal to postpone the trial for an immaterial test to determine whether the Army would actually have accepted him.

C. THE QUESTION OF PETITIONER'S SUITABILITY FOR MILITARY SERVICE WAS NOT A MATERIAL ISSUE AT TRIAL

Petitioner contends that his suitability for military service was a critical issue in his case and that it was error for the court to deny (A. 9) his motion for a mental examination on this question (A. 7–8) and to preclude cross-examination (A. 128, 131–132) on the point (Br. 7, 24–25, 29). This argument misapprehends the elements of the offense of which petitioner stands convicted.

1. Under 50 U.S.C. App. 462(a), which he was convicted of violating, petitioner's offense was his deliberate failure to perform a duty imposed pursuant to the Universal Military Training and Service Act, namely, his failure to comply with the order of his local Selective Service board "to submit to induction into the Armed Forces" (A. 6).

While it is true that the final transition from civilian to military life cannot be effected "until his [the selectee's] acceptability in all respects, including his physical and mental fitness, has been satisfactorily determined under standards prescribed by the Secretary of Defense" (50 U.S.C. App. 454(a)), it by no means follows that a person cannot violate his obligation to comply with an order to report for and submit to induction unless he has previously been found suitable for service or is at least suitable in fact.

The content of petitioner's obligation is, of course, a question of law, and in ascertaining whether the absence of a determination of his suitability was material we must turn first to the implementing regulations. Of special relevance to this case is the Selective Service regulation governing the priority the local board must follow in ordering its registrants to report for induction. This regulation declares the general rule that in filling its quota the board shall call up registrants who have been classified I–A or I–A–O *and* have been found acceptable for service in the Armed Forces and been mailed a Statement of Acceptability at least three weeks prior to the date fixed for induction. But the regulation then continues (32 C.F.R. 1631.7(a)):

> *Provided,* That a registrant classified in Class I–A or I–A–O who is delinquent may be selected and ordered to report for induction to fill an induction call notwithstanding the fact that he has not been found acceptable for service in the Armed Forces and has not been mailed a Statement of Acceptability (DD Form No. 62) * * *.

See also, 32 C.F.R. 1628.10. Since petitioner concedes that he was properly classified I–A and does not dispute that he was validly declared a delinquent (Br. 6–7), his local board was expressly directed to order him to report for induction even though he had not previously been found suitable for service. The facts of this case amply illustrate the reason for this authority: before he was ordered to report for induction petitioner had three times failed to appear for pre-induction physical examinations at which his acceptability would have been considered. The regulation was plainly designed to prevent such recalcitrance from immunizing a delinquent registrant from his obligation to take his place in filling a manpower quota.

Nor is this procedure inconsistent with the statute on which petitioner relies. Although the term "induction" is not defined in the Act, the pertinent Selective Service regulations make it clear that the registrant's duty to report for and submit to induction in compliance with an order of his local board includes participation in the induction *process,* even though the process may not actually culminate in entry into the Armed Forces. Thus, in dealing with the "Duty of [the] registrant to report for and submit to induction", and after providing that the registrant is to appear when and where directed by the local board, the relevant regulation specifies that (32 C.F.R. 1632.14):

> (b) Upon reporting for induction, it shall be the duty of registrant * * * (3) to appear at the place where his induction will be accomplished, * * * (5) to submit to induction, *and*

> (6) *if he is found not qualified for induction,* to follow the instructions of the representatives of the Armed Forces as to the manner in which he will be transported on his return trip to the local board. [Emphasis added.]

Hence, compliance with the mandate of Congress that only those qualified actually enter military service is finally and decisively assured *as a part of* the induction process itself. See also, 32 C.F.R. 1632.20 (a)(3), (b)(3), 1632.30. That the individual registrant may ultimately be found not fit to take the final "one step forward" in no way excuses a deliberate refusal to honor the order. Insofar as petitioner may be contending that a registrant cannot be accused of failing to "submit" to induction when he has not had a physical examination—even though the absence of such an examination is the result of his own refusal to appear for any scheduled examinations, including the one routinely given when a selectee reports for induction—his objection misunderstands and unduly narrows the scope of the duty to "submit to induction". This duty comprehends, *inter alia,* submission to the examination on the day of induction, at which the registrant's suitability for service is finally and decisively determined. See *Williams* v. *United States, supra,* 203 F. 2d at 87.

This analysis of the duty that petitioner failed to meet is confirmed by the relevant Army Regulations, which mesh with those of the Selective Service System.[4] Army Regulation (AR) 601-270, para. 13 (1965), provides in pertinent part:

[4] Army Regulations, like those of the Selective Service System, have the "force of law". *Standard Oil Co.* v. *Johnson,* 316 U.S. 481, 484.

> *Definitions.* For the purpose of this regulation [dealing with the operation and functions of armed forces induction stations], the following definitions will apply:
>
> * * * * *
>
> g. *Induction.* The procedure consisting of the physical inspection (or, if appropriate, the complete medical examination), mental testing (if not already accomplished), the completion of records and necessary processing to complete the transition from civilian to military status, for a period of defined obligation under the provisions of the Universal Military Training and Service Act, as amended.[5]

Here, too, the term induction is used to comprehend a cluster of elements, in addition to actual entry into the Army. It contemplates all of those procedures (excluding those performed by the Selective Service System) conducted at the induction station by members of the Armed Forces. For those who, like petitioner, have been declared delinquent because of their failure to report for pre-induction physical examinations, those procedures are clearly defined. In line with the statute upon which petitioners rests his argument (50 U.S.C. App. 454(a)), Army Regulation 601–270, para. 40(e)(2), provides that a delinquent must be physically examined in order to determine his suitability for service.[6] In the event he is found to be physically qualified for military service, he is then processed

[5] Compare *Billings* v. *Truesdell*, 321 U.S. 542, 547–548, where on the facts of that case the Court found induction to be the end of the process at the induction station—*i.e.*, taking the ceremonial step forward and becoming a member of the Armed Forces.

[6] See also, AR 601–270, para. 68(1).

in the normal manner (AR 601–270, para. 40(a)(3)). That process includes an induction orientation talk, roll call, physical inspection, and finally the transition from civilian to military life by taking the ceremonial step forward. Petitioner's crime thus consisted not only of failing to take the "final step", but also of his failing to submit to the physical examination which was a normal incident of induction for those who had been declared delinquent.[7]

In short, insofar as petitioner suggests that he could not have been compelled to report for "induction" and to enter the Armed Forces if qualified, because his physical suitability had not been previously determined, that contention is refuted by applicable regulations. *Moorman* v. *United States*, 389 F. 2d 27, 31 (C.A. 5); *Williams* v. *United States*, 203 F. 2d 85, 87 (C.A. 9), certiorari denied, 345 U.S. 1003.

2. Petitioner's contentions that the trial court erred in refusing to order that he be examined before trial for suitability and in precluding cross-examination on that issue must also be rejected for the same reason. The trial court properly viewed the dispositive question, not as whether petitioner would have been found physically suitable to perform his military obligation had he reported to the induction center as directed, but as whether he knowingly failed to comply with the duty to report for induction (A. 128). Unsuitability in fact is not a defense to such a charge. If it were, the same logic would demand acquittal

[7] See also, SSLR Practice Manual ¶1127, at 1083: "A registrant who wishes to challenge the legality of the * * * induction process as applied to him should report for induction and take all the steps up to the step forward which puts him into the armed forces." Cf. *Estep* v. *United States*, 327 U.S. 114.

of a young man who refused even to register with a local board, if he could establish that some physical malady would actually have made him unacceptable for service. Or, by parity of reasoning, a registrant would have a valid defense to a charge that he deliberately destroyed his draft card if he established that for physical or psychological reasons the Army would not have taken him. Apart from the ultimate question of whether the particular individual will actually serve, there is the distinguishable though related question of *how* that decision is to be made. With reference to the statutory requirement that a registrant not wilfully destroy his draft card, this Court recently observed: "the continuing availability to each registrant of his Selective Service certificates substantially furthers the smooth and proper functioning of the system that Congress has established to raise armies." *United States* v. *O'Brien,* 391 U.S. 367, 381. By the same token, "the smooth and proper functioning" of the system which must process thousands of men monthly demands that all registrants comply with the procedures that petitioner chose to flout in this case. It requires no elaborate argument to demonstrate the wholly disruptive consequences of permitting a registrant to ignore his local board's order that he present himself for possible entry into the Armed Forces, where he personally believes he is not acceptable for service and is willing to try to establish this condition later at a criminal trial. The Selective Service System and the Army have carefully detailed procedures for efficiently determining suitability for service (*supra,* pp. 23–27). The obligation to follow those procedures is settled by Act of

Congress,[8] and it would hardly accord with the congressional plan for raising armies to sanction deliberate repudiation of the administrative machinery by allowing a registrant to show in some later proceeding that, had he complied, he would not have been accepted. See *United States* v. *Irons,* 369 F. 2d 557, 558–559 (C.A. 6); compare *United States* v. *Collura,* 139 F. 2d 345 (C.A. 2).[9]

III.

THE TRIAL COURT PROPERLY TERMINATED A LINE OF INQUIRY DEALING WITH THE AUTHORITY OF THE CLERK OF THE LOCAL BOARD TO SIGN INDUCTION NOTICES

The induction notice to which petitioner refused to respond was signed by Mrs. Thelma Taylor, Clerk of Local Board No. 4. On cross-examination, petitioner attempted to challenge her authority to sign induction notices (A. 53–56). The trial court—satisfied that Mrs. Taylor had been clerk of the board for approximately 17 years, and had "customarily" (A. 55) signed induction notices in that capacity—terminated further inquiry into this matter. Petitioner argues that the validity of an induction order may be subject to attack,[10] and from this premise contends that the

[8] 50 U.S.C. App. 462(a), under which petitioner was convicted.

[9] Analogously, our jurisprudence recognizes no defense in a prosecution for practicing law or medicine without a license that, if the defendant had taken the appropriate examination, he would have proven himself qualified.

[10] But see Brief for Petitioner, p. 6.

validity of the order to report in this case turns upon Mrs. Taylor's authority to sign induction notices, and that the restriction of cross-examination in this area thus constituted reversible error. This argument must fall for two distinct reasons.

First, petitioner overlooks what we believe to be a critical distinction between the order itself and the form in which it is communicated to the particular selectee. Upon receipt of a monthly Notice of Call for a specified number of men to be delivered for induction, each local board must make a determination of those who are to be ordered to report (32 C.F.R. 1631.7). Unlike the situation with respect to classification, the local board's role in selecting men to meet its quota is largely ministerial. Selective Service regulations specify in precise detail the order in which the local board must call up men to fill its quota. 32 C.F.R. 1631.7(a). Indeed, under the provision of 32 C.F.R. 1631.7(a)(1), the inclusion of petitioner in the call was mandatory, since declared delinquents—which category concededly included petitioner—are first in priority and must be ordered to report even before volunteers may be accepted. Since there can be no contention that petitioner was not validly—indeed, necessarily—selected for induction by the local board, we fail to see how the legality of the order can be affected by the internal procedural detail that the communication of the order to the selectee was in fact

signed by the clerk of the board. Although a Selective Service regulation (32 C.F.R. 1604.59), to which petitioner does not allude, provides that the official papers of a board may be signed by the clerk if authorized to do so by resolution of the board transcribed in the minutes,[11] the courts have uniformly held that this procedure is directory rather than mandatory and have invariably held that no substantial rights are affected when the clerk signs the notice, even in the absence of proof of a formal board resolution. *E.g., United States* v. *Lawson,* 337 F.2d 800, 812 (C.A. 3), certiorari denied, 380 U.S. 919; *Talcott* v. *Reed,* 217 F.2d 360, 364 (C.A. 9). Thus, absent a showing of prejudice—and petitioner neither contends nor shows prejudice here[12]—a claim that the clerk was not authorized to sign the induction notice is not a defense to prosecution for disobeying the order to report. *Kent* v. *United States,* 207 F.2d 234 (C.A. 9); *Smith* v. *United States,* 157 F.2d 176, 181–182 (C.A. 4), certiorari denied, 329 U.S. 776; *United States* v. *Fratrick,* 140 F.2d 5, 6–7 (C.A. 7).

---

[11] 32 C.F.R. 1604.59 provides:

"Signing official papers.

"Official papers issued by a local board may be signed by the clerk of the local board if he is authorized to do so by resolution duly adopted by and entered in the minutes of the meetings of the local board, provided, that the chairman or member of the local board must sign a particular paper when specifically required to do so by the Director of Selective Service."

[12] Indeed, petitioner specifically concedes that his classification was in all respects proper (Br. 6–7), even though his notice of classification was signed by Mrs. Taylor as clerk (G. Ex. 5).

Second, the trial judge was fulfilling his responsibility when he ruled the questioning immaterial, because the issue counsel sought to raise was in no event pertinent for exploration before the jury. It has consistently been held that the validity of the order to report is a question of law for the trial court alone and for this reason it is not error to refuse to receive evidence on this question before a jury. *United States* v. *Tucker,* 374 F. 2d 731, 734 (C.A. 7); *United States* v. *Norris,* 341 F. 2d 527, 530–531 (C.A. 7), certiorari denied, 382 U.S. 850; cf. *Estep* v. *United States,* 327 U.S. 114, 122–125. The only issues for the jury were whether the board in fact ordered petitioner to report for and submit to induction and whether he deliberately failed to report and submit as ordered. The ruling of the trial judge terminating an immaterial line of questioning in the jury's presence was, therefore, sound.[13]

## IV

### THE EVIDENCE DID NOT ESTABLISH INSANITY AS A MATTER OF LAW

Petitioner's principal defense at trial was that his mental condition at the time of the failure to report for induction relieved him of criminal responsibility for his conduct. He recognizes (Br. 34) that the question of sanity *vel non* is a question of fact for the

[13] Petitioner did not make any proffer of proof bearing on Mrs. Taylor's authority to sign the induction notice, and thus, even assuming *arguendo* that her authority was relevant to the validity of the order, petitioner did not adequately raise the issue for determination by the court.

jury and expressly concedes (Br. 35) that the issue was submitted to the jury under proper instructions which he himself had requested and formulated.[14] His only contention is that "the facts when applied to the law of this case[,] namely the American Law Institute rule[,] would not permit a finding of guilty." On the contrary, we submit, the evidence was more than sufficient to sustain the jury's verdict.

The defense case turned on the testimony of two witnesses. The first, Dr. Alfred Quartaroli, a psychiatrist who had begun treating petitioner about a month and a half after his failure to report for induction, and who had been examining him on a weekly basis since then, testified (as we have noted, *supra,* p. 14) that petitioner came to see him because "he was concerned about his failure to answer the draft call and had mixed feelings about this situation" (Tr. 197.)[15]

---

[14] Petitioner requested that the following charge—identical to that formulated by the American Law Institute as Section 4.01 of the *Model Penal Code* (Proposed Official Draft (1962))—be given to the jury on the issue of insanity (A. 142):

"A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law."

With the exception of the substitution of the word "wrongfulness" for "criminality"—with which petitioner has no argument, and which substitution has been adopted by the Second and Seventh Circuits, *United States* v. *Freeman*, 357 F. 2d 606 (C.A. 2); *United States* v. *Shapiro*, 383 F. 2d 680 (C.A. 7)—the trial court instructed the jury exactly as requested (A. 137).

[15] "Tr." references are to the original trial transcript, which is on file with the Clerk of this Court.

After detailing petitioner's emotional history as petitioner had recounted it to him, the doctor noted that petitioner had suffered from depression "off and on most of his life" and that petitioner had told him that "he had been depressed severe enough to think about suicide even before he received his draft notice" (Tr. 210–211; A. 89). Dr. Quiartaroli further testified that as a "defense mechanism" against the unwelcome prospect of regularized Army life petitioner had denied the "gravity and severity" of "not following through what he was supposed to do"—"to comply to the requests made for induction" (A. 95). He stated that petitioner had known "intellectually" the wrongfulness of his failure to comply with the order to report for induction, but that petitioner had told him he had been "emotionally" unable to comply (A. 98–99). Dr. Quartaroli was of the view that petitioner's "mixed-up feelings" consisted of "conflict between his intellectual self, his knowing self, which knew that certain things should be done, such as he should study, he should achieve academically, he should reply to the draft notice, he should report for induction; and the emotional self, which stood in the way of accomplishing these facts" (Tr. 252). He concluded that at the time of his failure to report for induction, "because of his emotional condition [petitioner] was unable to comply with the requirements of the law," and that once he had failed to report for the earlier physical examinations, he was unable to change his conduct and comply with the later induction order (A. 106). Throughout his testimony Dr. Quartaroli made clear,

however, that petitioner, who suffered no organic brain damage (A. 109–110), was able to appreciate the difference between right and wrong and the consequences of wrongful action, and was not subject to compulsion (A. 111, 112). It was Dr. Quartaroli's belief that petitioner was suffering from "an emotionally unstable personality", which he regarded as a "mental disorder" (A. 109, 110, 112).

The other medical witness testifying for the defense was Dr. Morton Silverman, a clinical psychologist. He testified that he had given petitioner various psychological tests in September 1966 (A. 119). Based on these tests and other information, Dr. Silverman was of the opinion that petitioner had an "emotional problem" that enabled him to perform well "in a limited number of situations in which he felt comfortable" but that made him unhappy or uncomfortable with many everyday situations that for most people would be routine (A. 120–121).

In rebuttal, the government called Dr. Edward Vadeika, a Navy psychiatrist who had examined petitioner on January 13, 1967, for about one hour in the presence of two other Navy doctors (A. 122, 126). Dr. Vadeika agreed that petitioner suffered from emotional problems manifesting anxiety, depression, poor motivation, and resentment toward authority, but was of the view that petitioner was "able to distinguish the difference between right and wrong, and also to be able to adhere to the right" (A. 123–124). In his opinion, petitioner did "not lack substantial capacity to appreciate the wrongfulness * * *

of his behavior or to conform his behavior to the requirements of the law" (A. 125–126).

Petitioner's claim that on this record the jury was obliged to return a verdict of *not guilty by reason* of insanity is baseless. Both the government and defense psychiatrists agreed that petitioner had the substantial capacity to appreciate the wrongfulness of his conduct (A. 111–112, 125–126). And although Dr. Quartaroli and Dr. Vadeika disagreed about whether petitioner had the substantial capacity to conform his conduct to the requirements of the law (A. 105, 106, 111–112, 125–126), assessments of the significance of the differing diagnoses was properly left to the jury. Since in this case the weight to be accorded to the medical testimony depended critically on the reliability and comprehensiveness of the version of the underlying events expressed by the patient and accepted by the psychiatrist, a favorable medical diagnosis can scarcely create a reasonable doubt of sanity as a matter of law. In addition, the appropriateness of leaving final resolution of a factual issue to the jury, reviewable only for clear error, is especially clear in cases like this, where the jury must make a delicate judgment on the criminal responsibility of their peer for his conduct. Since there was at most a difference of professional opinion about the impact of petitioner's "emotional problem," the jury's determination that he is accountable for his conduct should be respected. See *e.g., Washington* v. *United States,* 390 F. 2d 444 (C.A.D.C.); *King* v. *United States,* 372 F. 2d 383 (C.A.D.C.); *Birdsell* v.

*United States,* 346 F. 2d 775 (C.A. 5), certiorari denied, 382 U.S. 963; *Merrill* v. *United States,* 338 F. 2d 763 (C.A. 5).[16]

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be affirmed.

ERWIN N. GRISWOLD,
*Solicitor General.*
FRED M. VINSON, JR.,
*Assistant Attorney General.*
PHILIP A. LACOVARA,
JOSEPH J. CONNOLLY,
*Assistants to the Solicitor General.*
JEROME M. FEIT,
LAWRENCE P. COHEN,
*Attorneys.*

OCTOBER 1968.

[16] Petitioner also asks this Court (Br. 30–35) to announce a general rule on the issue of insanity to be applied in all circuits. Since petitioner admits that he was tried under the standard he wishes to see applied generally, he is not in a position to ask this Court to resort to dictum to promulgate something as critical as a single formulation of the insanity test. In addition, we note that this Court has consistently refused to entertain certiorari petitions even where the issue as to the standard of mental responsibility was raised in a proper context. A sound reason for this course was recently expressed by Mr. Justice Marshall, who stressed that the formulation of a hard and fast rule at this time "would reduce, if not eliminate, that fruitful experimentation, and freeze the developing productive dialogue between law and psychiatry into a rigid constitutional mold." *Powell* v. *Texas,* 392 U.S. 514, 536–537. Even if the Court were to rely only on its supervisory power over the federal courts, the stultifying effect of imposing a single permissible approach to this complex problem would have similarly undesirable consequences.

U.S. GOVERNMENT PRINTING OFFICE: 1968